88-1261

No._____

Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1988

MARIA PESTE, IOAN PESTE, NICOLAE VECERDEA, ELENA VECERDEA, DUMITRU SAULEAN, VETA SAULEAN, IOAN OLTEAN, MARIA OLTEAN, GEORGE MARCU, and TRANDAFIRA MARCU,

Petitioners,

vs.

THE HONORABLE R. R. DENNY CLUNK, Judge, Court of Common Pleas, Probate Division, Stark County, Ohio,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. WHETHER NON-RESIDENT ALIENS ARE ENTITLED TO THE PROTECTION OF THE FOURTEENTH AMENDMENT WHEN THEIR INHERITANCE RIGHTS ARE ADJUDICATED IN THE UNITED STATES?

2. WHERE A TREATY BETWEEN THE UNITED STATES AND ROMANIA PROTECTS THE RIGHT OF ROMANIAN NATIONALS TO RECEIVE INHERITANCES IN THE UNITED STATES AND TO HAVE THE SUMS DERIVED THEREFROM TRANSFERRED TO THEM, IS THE EXTINCTION OF SAID RIGHT WITHOUT DUE PROCESS OF LAW TANTAMOUNT TO A VIOLATION OF THE TREATY?

3. WHETHER THE DOCTRINE OF JUDICIAL IMMUNITY BARS A FEDERAL QUESTION SUIT AGAINST A STATE COURT JUDGE FOR DECLARATORY AND INJUNCTIVE RELIEF?

4. WHERE THE COURT OF APPEALS SUA SPONTE INJECTED AND RULED ON ISSUES WHICH HAD NOT BEEN CONSIDERED BY THE DISTRICT COURT, DOES THIS COURT HAVE JURISDICTION TO REVIEW THE PROPRIETY OF SUCH RULINGS?

PARTIES TO PROCEEDING

The only parties to this proceeding in this Court are those indicated in the caption of this petition for a writ of certiorari.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners, Maria Peste, Ioan Peste, Nicolae Vecerdea, Elena Vecerdea, Dumitru Saulean, Veta Saulean, Ioan Oltean, Maria Oltean, George Marcu, and Trandafira Marcu, respectfully pray that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Sixth Circuit, entered in this proceeding on October 31, 1988.

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals is unreported (see appendix attached, p. 15, infra).

The opinion of the United States District Court is unreported, and appears in the appendix, p. 21, infra.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on October 31, 1988.

This petition for certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C., Section 1254(1).

CONSTITUTIONAL PROVISION

FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION:

. . . No State shall . . . deprive any person of . . . property, without due process of law; . . . .

STATEMENT OF THE CASE

This action was filed in the United States District Court for the Northern District of Ohio, Eastern Division, under 28 U.S.C., Section 1331(a), to annul and vacate a judgment rendered by the Common Pleas Court of Stark County, Ohio, Probate Division, which extinguished the testamentary rights of petitioners as legatees and devisees without due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

On the basis of undisputed material facts, petitioners moved the court for a summary judgment as a matter of law. The respondent filed a motion to dismiss the complaint for the reason that, as a sitting judge, he was immune from a "suit for damages."[1] The district court disregarded the motions of both parties, and sua sponte, ruled that the petitioners, "being Romanian citizens and residents, have no claim to the protections and guarantees of the Constitution of the United States." Thereupon, the district court dismissed the complaint.

---

[1] The action is for declaratory and injunctive relief, and not for damages.

The decision of the district court was appealed to the Sixth Circuit Court of Appeals. The sole issue presented on appeal was "Whether the protections and guarantees of the United States Constitution may be invoked by non-resident aliens to protect their property rights in the United States." In the motion to expedite determination of the appeal, petitioners invited the court's attention to the Consular Convention between the United States and Romania, 24 U.S.T. 1317; TIAS 7643, as being relevant to the issue before the court. The court of appeals evaded the sole constitutional issue before it and affirmed the lower court's dismissal of the action on other grounds.

The facts, as summarized from the complaint (see p. 29, infra), are as follows:

The petitioners, citizens and residents of Romania, are the legatees and devisees under the last will and testament of John Marcu, who died a resident of Alliance, Ohio, on March 11, 1982. The will was admitted to probate by the Probate Court of Stark County, Ohio. The First National Bank of Alliance, Ohio, now known as Bank One of Alliance, was appointed as the executor of the estate of said decedent. An action was filed against the estate in the Probate Court of Stark County, Ohio, to enforce a contract to make a will allegedly entered into by the decedent, and to impress a trust upon the assets of the estate. The complaint named the executor, these petitioners, and other beneficiaries under the will as defendants. The executor answered the complaint for itself and for these petitioners and the other defendants. On November 17, 1982, an *ex parte* trial was held in the absence and without the presence of the

petitioners, or of their duly authorized representative, to defend in the case. Thereafter, the probate court rendered a judgment on the complaint and extinguished the right of the petitioners to inherit from the estate of John Marcu.

The petitioners did not receive any notice from the probate court, from the attorney for the claimant, or from the executor, which had notice of the trial date; and they did not have any knowledge, whatsoever, that the trial would be held on November 17, 1982.

Due to the failure and/or refusal of the executor to notify the petitioners of the trial date of the action and/or to take measures to protect and to preserve their rights as beneficiaries of the estate, the petitioners sued the executor for breach of fiduciary duties and negligence in the District Court for the Northern District of Ohio, Eastern Division, to recover damages for the loss of the inheritance. The district court dismissed the petitioners' action on the ground that the disinheritance resulted from the judgment of the probate court and was not due to the misconduct of the executor. On appeal, the court of appeals agreed with the district court that the petitioners' loss of inheritance "was not caused by any negligence on the part of the bank" but by the judgment of the probate court. The court of appeals thereupon affirmed the unconstitutional judgment of the probate court (see p. 25, infra). This action resulted therefrom.

REASONS FOR GRANTING THE WRIT

1. The decision below raises important and substantial questions concerning the right of non-resident aliens to Fourteenth Amendment protection in the adjudication of their inheritance rights in the United States.

The immutable record in this case reveals that the fundamental requisites of due process – notice and an opportunity to be heard – have been violated by the probate court. The petitioners did not have any notice of the trial of November 17, 1982, and they were not given an opportunity to appear and to defend at that trial. Nevertheless, the probate court rendered a judgment as a result of the *ex parte* trial, whereby it extinguished the inheritance rights of the petitioners.

It is clear that the judgment of the probate court contravenes the precedents of this Court, under which a judgment entered without notice or service violates the Due Process Clause. See, e.g., *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306; *Armstrong v. Manzo*, 380 U.S. 545; *Peralta v. Heights Medical Center, Inc.*, (1988), 108 S.Ct. 896. Thus, the challenged judgment is void, *ab initio* . It creates no binding obligations upon the parties or their privies, and it is legally ineffective. *Moore's Federal Practice, Second Edition*, Section 60.25[2]; *Jordan v. Gilligan*, (6 Cir - 1974), 500 F. 2d 701; *Graciette v. Star Guidance, Inc.*, (SDNY - 1975), 66 F.R.D. 424.

The district court held that the petitioners may not invoke the protections of the Fourteenth Amendment because they are "neither United States citizens nor do they reside within the jurisdiction of the United States". The court interpreted the decisions of this court in *Johnson v. Eisentrager*, (1949), 339 U.S. 763 , and *Yick Ho v. Hopkins*, (1886), 118 U.S. 356, as holding that an alien's presence within the United States gives our judiciary the power to act. Since the petitioners are not resident aliens, the district court dismissed the complaint, *sua sponte*, and no more. The dismissal was the "final decision" appealed from. The respondent filed no answer or other pleading addressed to the merits.

The district court's dismissal of the complaint is especially egregious in light of the established and long-accepted legal principle that the capacity and standing of friendly "non-resident aliens" to invoke the process of our courts, both state and federal, is unquestioned. As a general rule, aliens other than enemy aliens, who are *sui juris* and who are not incapacitated by law of the place where the action is brought, may maintain suits in the proper courts to vindicate their rights and redress their wrongs. The basis of the maintenance of an action by an alien is comity – the comity which permits an alien to sue is not the comity of the courts but is the comity of nations. C J S Sec. 47, *Aliens*.

In *Pfizer v. Lord*, (1975), 522 F.2d 619, the court held that when rights of a non-resident alien to property within the United States are adjudicated in United States courts, the alien may well be entitled to due process. The principle that non-resident aliens are entitled to due process when their rights to property in the United States are adjudicated here is succinctly

and aptly expressed in the decision of the Second Circuit Court of Appeals in *Sardino v. Federal Reserve Bank*, (1966), 361 F.2d 106. In that case, Judge Friendly wrote, pertinent hereto:

> The Government's second answer that *"The Constitution of the United States confers no rights on non-resident aliens" is so patently erroneous in a case involving property in the United States that we are surprised it was made.* (Italics supplied.) Throughout our history the guarantees of the Constitution have been considered applicable to all actions of the Government within our borders – and even to some without. Cf. *Reid v. Covert*, 354 U.S. 1, 5, 8 (1957) . . . . In *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489, 491 (1931) . . . , the Court squarely held that an alien friend is entitled to the protection of the Fifth Amendment's prohibition of taking without just compensation – even when his government was no longer recognized by this country. And the Court has declared unequivocally, *with respect to non-resident aliens owning property within the United States, that they "as well as citizens are entitled to the protection of the Fifth Amendment.*" (Italics supplied.)

Thus, we see that the district court's decision that an alien's presence within the United States is a prerequisite to invoking the judicial power of our courts is, to borrow from Judge Friendly's statement, "so patently erroneous that it is difficult to comprehend that it was made."

The sole issue before the court of appeals was whether

the inheritance rights of the petitioners were entitled to protections of the Fourteenth Amendment. The Sixth Circuit refused to consider whether the constitutionally flawed judgment of the probate court is binding on the petitioners. It disregarded said issue entirely and ruled that the dismissal of the complaint was proper on other grounds. In effect, the court of appeals placed its *imprimatur* on the void judgment by refusing to review the validity of the district court's ruling that the petitioners, as non-resident aliens, were not entitled to protections of the Fourteenth Amendment.

In the instant case, the petitioners, as Romanian nationals, also have the protection of a certain treaty that was entered into between the United States and Romania in 1972 which governs the consular relations between the two nations. (See 24 U.S.T. 1317; TIAS 7643.) The protocol to said treaty provides, pertinent hereto, as follows:

> The Government of the United States assures the Government of the Socialist Republic of Romania that:
>
> 1. There is no Federal law or other legislation barring or restricting the rights of Romanian nationals to receive inheritances in the United States and have the sums derived therefrom transferred to them.

The denial of due process to the petitioners in the adjudication of their inheritance rights, in effect, violated the consular treaty. The treaty assures the right of Romanian nationals to receive their inheritances in the United States and to have the sums derived therefrom transferred to them.

Both lower courts were duly informed of the consular treaty. However, they refused to consider its relevancy to the issue before them.

2. The decision below raises significant and recurring problems concerning federal appellate jurisdiction, judicial immunity and the doctrine of *res judicata.*

The Sixth Circuit completely ignored the petitioners' due process claim and ruled instead that the action is meritless in two respects – first, that the respondent is absolutely immune for actions taken by him within the bounds of his jurisdiction; second, that the principles of *res judicata* bar the instant suit.

The court of appeals ruled that the respondent judge "is entitled to absolute immunity for actions taken by him within the bounds of his jurisdiction." It cited *Stump v. Sparkman*, (1978), 435 U.S. 349, and *Pierson v. Ray* , (1966), 386 U.S. 547, to support the decision. The court then went on to declare that "[t]he case could and should have been dismissed on this basis" (infra p. 19).

The decision of the court of appeals with respect to judicial immunity is clearly inconsistent with the decisions of this Court and other federal courts. *Pulliam v. Allen*, (1984), 104 S.CT. 1970; *Mitchum v. Foster*, (1972), 407 U.S. 225. In Mitchum, the Court made clear that Congress has not rendered federal courts impotent in the face of an infringement of consti-

tutional rights by the judicial arm of state government. As the Court said in Mitchum, "[t]he very purpose of section 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights – to protect the people from unconstitutional action under color of law 'whether that action be executive, legislative or *judicial*.' " (Italics supplied.)

Courts have overwhelmingly held that judges are not immune in actions involving federal rights when they are sued for declaratory or injunctive, rather than monetary, relief. The Court of Appeals for the Second Circuit has aptly stated:

> No sound reason exists for holding that federal courts should not have the power to issue injunctive relief against commission of acts in violation of a plaintiff's civil rights by state judges acting in their official capacity. *Erdman v. Stevens*, (2 Cir - 1972), 458 F.2d 1205, cert. denied, 409 U.S. 889.

Judge Wisdom also has emphasized that *Pierson v. Ray* "does not, of course, mean that [judges] may not be enjoined from pursuing a course of unlawful conduct." *United States v. McLeod,* (5 Cir - 1967), 385 F.2d 734.

Before a judgment is *res judicata* or has the effect of a collateral estoppel between the parties and those in privity with them, the judgment, of course, must be valid. If it is void, i.e., a judicial nullity, it is subject to collateral attack at any time and in any proceeding. *Moore's Federal Practice, Second Edition,* Section 0.405[4.-1] at 634, 635; *Kremer v. Chemical Const. Corp.*, (1982), 102 S. Ct. 1893, 1898. Thus, *res*

judicata is inapplicable where the state court proceeding was a denial of due process, and the plaintiff requests the district court to declare the judgment null and void. *Rhodes v. Penfold,* (5 Cir - 1983), 694 F.2d 1043.

Apparently, the Sixth Circuit considered the constitutional issue insubstantial since it disregarded it entirely[2] and, instead, elected to base its decision on judicial immunity and on the doctrine of *res judicata.* To support its holding that *res judicata* barred the instant action, the court of appeals referred to a prior appeal and its ruling therein whereby it had affirmed dismissal of the petitioners' suit against the executor, and stated: "The issue of plaintiffs' (petitioners') failure to take under Marcu's will has been repeatedly and finally decided. Principles of *res judicata* bar this action" (infra p. 20). In the same earlier ruling, the court of appeals held that "even if the plaintiffs (petitioners) had prosecuted to its fullest extent, the judgment would have been the same" (infra p. 28).

In *Peralta v. Heights Medical Center, Inc.*, (1988), 108 S.Ct. 896, this Court rejected a similar argument as being untenable. At page 900, Justice White, speaking for a unanimous Court, declared:

> Where a person has been deprived of property in a manner contrary to the most basic tenets of due process, "it is no answer to say that in his particular case due process would have led to the same result because

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[2] The court of appeals determined that the appeal was frivolous and, pursuant to Rule 38, Fed. R. App. Proc., ordered the undersigned attorney to pay double costs to the appellee.

> he had no adequate defense upon the merits" (citation omitted). As we observed in *Armstrong v. Manzo, supra*, 380 U.S. at 552, . . . only "wiping the slate clean . . . would have restored the petitioner to the position he would have occupied had due process of law been accorded him in the first place."

To borrow from the language in Peralta, the Due Process Clause demands no less in this case.

There is another significant aspect of the appellate court's ruling with respect to *res judicata.* The issue of *res judicata* had not been before the district court and, of course, it had not been passed upon by that court. Nevertheless, the court of appeals, *sua sponte,* considered an issue that had not been ruled upon by the district court. This Court has found such conduct impermissible, *Singleton v. Wulff,* (1976), 428 U.S. 106, unless "where the proper resolution is beyond any doubt" or where "injustice might otherwise result." On the basis of the record of the case, and in view of the special importance of the constitutional question involved, it is readily evident that injustice has resulted from the improper exercise of appellate jurisdiction by the Sixth Circuit.

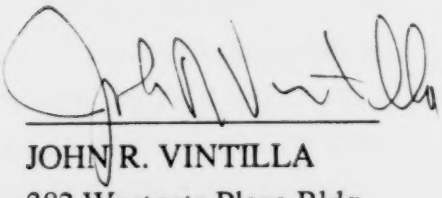
Whether this Court may consider an important issue affecting constitutional rights, which had not been passed upon below, is an important question of federal appellate jurisdiction. In dealing with an analogous issue in *Bender v.Williamsport Area School District,* (1986), 106 S.Ct. 1316, 1331, this Court declared:

"... When the lower federal court lack[s] jurisdiction, we have jurisdiction on appeal, not on the merits but merely for the purpose of correcting the error of the lower court entertaining the suit." (quoting *United States v. Corrick*, (1936), 298 U.S. 435, 440. This obligation to notice defects in a court of appeals' subject-matter jurisdiction assumes a special importance when a constitutional question is presented.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Sixth Circuit.

Respectfully submitted,



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APPENDIX A.

No. 87-4030

IN THE UNITED STATES COURT OF APPEALS
For the Sixth Circuit

MARIA PESTE, IOAN (JOAN) PESTE, NICOLAE VECERDEA, ELENA VECERDEA, DUMITRU SAULENA, VETA SAULEAN, IOAN (JOAN) OLTEAN, MARIA OLTEAN, GEORGE MARCU, TRANDAFIRA MARCU,

Plaintiffs - Appellants,

v.

THE HONORABLE R.R. CLUNK, Judge of Common Pleas Court, Stark County Probate Division,

Defendant - Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

(Decided and Filed October 31, 1988)

Before: WELLFORD AND BOGGS, Circuit Judges; and PECK, Senior Circuit Judge.

I.

PER CURIAM: The plaintiffs in this action, citizens and residents of Romania, filed this action against R.R. Clunk, a judge in the Court of Common Pleas for Stark County, Ohio, seeking an injunction to annul and vacate a judgment in an action in probate which extinguished plaintiffs' right as legatees and devisees under a will. The probate court's action was based upon a contract made by the decedent to leave his estate to another relative. Plaintiffs claimed that the judgment was entered in violation of their due process rights because they were not given adequate notice and an opportunity to be heard before the final decision made by the probate court. Plaintiffs seek injunctive relief under 42 U.S.C. § 1983. The district court, *sua sponte,* granted summary judgment for defendant on the ground that the plaintiffs, as nonresident aliens, possessed no legal or constitutional rights to challenge the probate court judgment. We affirm on other grounds.

II.

The plaintiffs were the legatees and devisees under John Marcu's will. Marcu died a resident of Alliance, Ohio, on March 11, 1982, and his will was admitted to probate by Stark County Probate Judge Rubin Wise on March 19, 1982. The First National Bank of Alliance, Ohio, now known as Bank One of Alliance, was appointed as the executor of Marcu's estate.

Thereafter, an action was filed against the estate in the Probate Court by John Dalalau to enforce a contract to make a

will allegedly entered into by the decedent and to impress a trust upon the assets of Marcu's estate. Dalalau sued the bank as executor, named also as holding the assets of the estate, and all the legatees in Marcu's will, including the plaintiffs herein. Judgment in this action was ultimately entered in favor of Dalalau, and the plaintiffs in the present case filed an action in the United States District Court in northern Ohio against the executor claiming that it had breached its fiduciary duties in failing to defend the action on their behalf. In an appeal by the plaintiffs herein from an adverse judgment, this court discussed the procedural history of the Dalalau action:

> Copies of the complaint and summons were served on the plaintiffs in this action.
>
> First National City Bank of Alliance filed an answer on June 22, 1982 which stated that the executor was without knowledge that an agreement to make a will existed. The plaintiffs here did not file an answer, though one of them wrote a letter to the probate judge attacking the Dalalau claim as not furthering Marcu's intent.
>
> After denying Dalalau's motion for default judgment, the matter was set for final hearing on November 17, 1982. Alliance bank received notice of the hearing but the plaintiffs did not. The bank did not appear at the hearing to represent the interests of the plaintiffs nor did it notify them of the time and place of the hearing. On December 8, 1982, attorney Louis Nyerges motioned the probate court to appear on behalf of the

> plaintiffs. On January 7, 1983, the Stark County Probate Court upheld Dalalau's claim . . . .
>
> Though Nyerges filed a motion for a new trial based, in part, on the ground that plaintiffs did not have notice of the hearing, the motion was denied. When Nyerges later appealed on behalf of the plaintiffs, he did not argue the notice issue, citing only the insufficiency of the evidence that the contract existed. The Ohio appellate court affirmed on August 29, 1983, based on the strength of the evidence, citing Ohio Rev. Code Ann. § 2107.04. After the plaintiffs' motion to vacate the probate court's judgment was denied, they brought the present action for breach of fiduciary duty.

Peste v. First National City Bank of Alliance, No. 85-3979 (6th Cir., Oct. 22, 1986). In affirming the judgment of the district court in favor of the executor, this court noted "[w]e agree with the district court that even if the plaintiffs' position had been prosecuted to its fullest extent, the judgment in the probate court would have been the same." *Id.*

On January 7, 1985, the plaintiffs filed a motion to set aside judgment in the Stark County Probate Court, which was denied. Thereafter, the plaintiffs filed the present action again in the same district court against Judge Clunk as the duly elected and acting Judge of the Probate Division of the Common Pleas Court of Stark County, Ohio, seeking a mandatory injunction directing Judge Clunk to annul and vacate the judgment entered on January 7, 1983, in favor of Dalalau and

seeking reinstatement of their lawsuit against the executor pursuant to 42 U.S.C. § 1983. Plaintiffs now appeal the grant of summary judgment to the defendant in their § 1983 action.

III.

Plaintiffs' present § 1983 action is meritless. First, Judge Clunk is entitled to absolute immunity for actions taken by him within the bounds of his jurisdiction. *Stump v. Sparkman*, 435 U.S. 349 (1978); *Pierson v. Ray*, 386 U.S. 547 (1966). Judge Clunk, however, was not the presiding judge at the trial of the Dalalau action and did not enter judgment against plaintiffs in that action. The "act" of Judge Clunk for which plaintiffs seek injunctive relief is his failure in his supervisory capacity as probate judge to annul and vacate the judgment entered in the prior Dalalau action.[1] It is doubtful that defendant had any role in that action. If he did, his "act" or, more properly, omission was clearly within his jurisdiction as probate judge. The case could and should have been dismissed on this basis.

Moreover, the merits of plaintiffs' case with regard to the Dalalau action have been fully considered by the Ohio Court of Appeals on direct appeal, the United States District Court for the Northern District of Ohio in plaintiffs' action against the executor, and by this court in plaintiffs' appeal from the district

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[1] According to plaintiffs' complaint, the judge who presided over the Dalalau action and who entered judgment therein is deceased. It is unclear from the record whether that judge or Judge Clunk issued the denial of plaintiffs' subsequent motion to vacate the judgment.

court's judgment against them in that action. Each court found that the evidence in the Dalalau action overwhelmingly established the existence of a contract to make a will, and this court concluded that "even if the plaintiffs' position had been prosecuted to its fullest extent, the judgment in the probate court would have been the same." Plaintiffs' attempt in the instant action to reinstitute their lawsuit against the executor is clearly barred by *res judicata*. The issue of plaintiffs' failure to take under Marcu's will has been repeatedly litigated and finally decided. Principles of *res judicata* bar this action.

Accordingly, we **AFFIRM** the judgment of the district court. We further determine that plaintiffs' appeal is frivolous and award double costs to appellee pursuant to Fed. R. App. P. 38 to be assessed against plaintiffs' attorney for pursuing this appeal.

APPENDIX B.

No. C87-1671-A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MARIA PESTE, et al.

Plaintiff

-v-

HONORABLE R. R. CLUNK,
JUDGE, COURT OF COMMON PLEAS,
STARK COUNTY, OHIO

Defendant

JUDGE SAM H. BELL

ORDER

(Filed October 6, 1987)

Plaintiffs are both citizens and residents of the Socialist Republic of Romania. They have filed at least three lawsuits in this country seeking ultimately to recover an inheritance they believe is due them as heirs under the will of John Marcu, a former Stark County, Ohio resident. They were parties to a will contest, which was heard in the defendant's court on November 17, 1982. As a result of that contest, any claims plaintiffs had under the will were extinguished. They are now before this court claiming that they were denied due process of law under the Fourteenth Amendment to the United States Constitution because they were not notified of the November 17, 1982 hearing date. They did not appear and the Stark County Probate Court entered a judgment against them on January 7, 1983.

Plaintiffs are now requesting this court to declare the judgment of January 7, 1983, to be in violation of the Constitution of the United States insofar as that judgment authorized the deprivation of plaintiffs' inheritance without due process of law.

The first issue this court must address is whether these plaintiffs are appropriate parties to invoke Fourteenth Amendment protections. These plaintiffs are neither United States citizens nor do they reside within the territorial jurisdiction of the United States. Only an alien's presence within the territorial jurisdiction of the United States gives the judiciary power to extend him constitutional protections. *Johnson v. Eisentrager*, 339 U.S. 763 (1949). Since at least 1886, we have extended to the person and property of resident aliens important constitutional protections including the due process guarantee of the Fourteenth Amendment. *Yick Ho v. Hopkins*, 118 U.S. 356

(1886). But in extending constitutional protections beyond the citizenry, the Supreme Court has been careful to point out that it was the alien's presence within the United States that gave the judiciary the power to act. *Johnson, supra.* A fortiori, these plaintiffs, being Romanian citizens and residents, have no claim to the protections and guarantees of the constitution of the United States. Accordingly, plaintiffs' lawsuit is dismissed.

IT IS SO ORDERED.

SAM H. BELL
U.S. DISTRICT JUDGE

APPENDIX C.

No. 85-3979

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARIA PESTE, IOAN (Joan) PESTE, NICOLAE VECERDEA, ELENA VECERDEA, DUMITRU SAULENA, VETA SAULEAN, IOAN (Joan) OLTEAN, MARIA OLTEAN, GEORGE MARCU, TRANDAFIRA MARCU,

Plaintiffs - Appellants

v.

THE FIRST NATIONAL CITY BANK OF ALLIANCE,

Defendant - Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

(Filed October 2, 1986)

Before: KENNEDY and MARTIN, Circuit Judges; and PECK, Senior Circuit Judge.

PER CURIAM. This is one of the rare times that probate matters are litigated under federal jurisdiction. The plaintiffs, residents of Romania, appeal an adverse breach of fiduciary duty claim against the bank as executor of the estate of John Marcu.

John Marcu of Alliance, Ohio, died testate on March 11, 1982, and his will was probated on March 1982, with defendant, First National Bank of Alliance, acting as executor. The plaintiffs, certain of his Romanian relatives, allege that the bank failed to protect their rights as residuary legatees under his will in a proceeding attacking the will brought by John Dalalau in the Ohio probate court. Dalalau prevailed in the probate action based on the finding that Marcu had contracted with him to make a will, agreeing that Marcu's entire estate would go to Dalalau. The probate court found, and we agree, that the failure of the plaintiffs to take under the decedent's will was not caused by any negligence on the part of the bank, but rather, by the undisputed existence of the contract between Marcu and Dalalau.

The plaintiffs argue here that the district court erred in granting the bank summary judgment. They argue that the judgment was founded on the district court's speculation that plaintiffs could not offer proof which would have changed the outcome of the decision in probate court. The strength of the evidence of a contract to make a will is too overwhelming to accept this argument. Further, plaintiffs had a forum to appeal in the Ohio court system.

John Marcu was born in Romania and came to the United States in 1914. He was eighty years old in 1978, had no living relatives in this country, and was looking for

someone to take care of him. From letters introduced in the trial in the Ohio probate court, it appears that on March 7, 1978, he wrote his nephew Ioan Dalalau in Romania asking him to see if his son John Dalalau would like to come to America. Marcu wrote that he had real and personal property worth $70,000 and that if John came to Ohio and something happened to Marcu, everything would be left to John.

On June 25, 1978, Marcu again wrote to Ioan, confirming John's acceptance of his offer. In June of 1980, John Dalalau gave up his job and with his wife and son, left Romania for the United States. He settled in Alliance, Ohio, and lived there until 1984, caring for Marcu until his death in March of 1982. In his will, Marcu did not leave his entire estate to John Dalalau as promised, and Dalalau filed a complaint against the estate on May 19, 1982. Copies of the complaint and summons were served on the plaintiffs in this action.

First National City Bank of Alliance filed an answer on June 22, 1982 which stated that the executor was without knowledge that an agreement to make a will existed. The plaintiffs here did not file an answer, though one of them wrote a letter to the probate judge attacking the Dalalau claim as not furthering Marcu's intent.

After denying Dalalau's motion for default judgment, the matter was set for final hearing on November 17, 1982. Alliance Bank received notice of the hearing but the plaintiffs did not. The bank did not appear at the hearing to represent the interests of the plaintiffs nor did it notify them of the time and place of the hearing. On December 8, 1982, attorney Louis Nyerges motioned the probate court to appear on behalf of the

plaintiffs. On January 7, 1983, the Stark County Probate Court upheld Dalalau's claim. The court found that Marcu had entered into a contract in writing in which he agreed to make a will devising and bequeathing his entire estate to Dalalau, if he would leave Romania and move to Alliance, Ohio. It found that Dalalau did this in reliance on Marcu's promise and therefore the contract should be specifically performed.

Though Nyerges filed a motion for a new trial based, in part, on the ground that plaintiffs did not have notice of the hearing, the motion was denied. When Nyerges later appealed on behalf of the plaintiffs, he did not argue the notice issue, citing only the insufficiency of the evidence that the contract existed. The Ohio appellate court affirmed on August 29, 1983 based on the strength of the evidence, citing Ohio Rev. Code Ann. § 2107.04. After the plaintiffs' motion to vacate the probate court's judgment was denied, they brought the present action for breach of fiduciary duty.

In its memorandum opinion, the district court emphasized that the Ohio appellate court had stated that the evidence of the contract was so strong that there could have been no other judgment. It went on to say that under Ohio law"[a]n agreement to make a will takes priority over any other later disposition of property made during the lifetime of any other parties to the agreement." *Fitch v. Oesch,* 30 O. Misc. 15 (C.P. 1971). Thus, for the plaintiffs in this case to have prevailed before the probate court they would have had to show either that no contract existed or that Dalalau failed to perform his part of the agreement. The only evidence the plaintiffs offered consists of their own affidavits and letters written by Marcu, indicating that as of 1981 Marcu no longer intended to leave his property to

Dalalau. None of this evidence tends to disprove the existence or performance of the contract. It is clear that Dalalau came to Ohio in reliance on the promise made by his great uncle and that he fulfilled his part of the bargain. These facts are not disputed.

We agree with the district court that even if the plaintiffs' position had been prosecuted to its fullest extent, the judgment in the probate court would have been the same.

The judgment of the district court is affirmed.

APPENDIX D.

No. C87-1671A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MARIA PESTE, IOAN (Joan) PESTE, NICOLAE VECERDEA, ELENA VECERDEA, DUMITRU SAULENA, VETA SAULEAN, IOAN (Joan) OLTEAN, MARIA OLTEAN, GEORGE MARCU, TRANDAFIRA MARCU,

Plaintiffs

vs.

THE HONORABLE R. R. DENNY CLUNK,
JUDGE, COURT OF COMMON PLEAS,
PROBATE DIVISION
STARK COUNTY, OHIO
CANTON, OHIO

Defendant

COMPLAINT
(Filed July 2, 1987)

JUDGE BELL

1. This is an action of a civil nature brought to invalidate, to vacate and to set aside an Order and/or Judgment of the Probate Division of the Common Pleas Court of Stark County, Ohio. The action arises under the Fourteenth Amendment to the Constitution of the United States. Jurisdiction is conferred upon this court by 28 U.S.C., section 1331(a).

2. At all times relevant herein, the plaintiffs were nationals and residents of the Socialist Republic of Romania.

3. The defendant is the duly elected and acting Judge of the Probate Division of the Common Pleas Court of Stark County, Ohio (hereafter "Probate Court"). As the judge, he has supervisory authority over the operation and conduct of said court, and he acts as his own clerk.

4. On or about March 11, 1982, John Marcu, late of Alliance, Ohio, died testate, leaving a will whereby he named the plaintiffs as his legatees and devisees. The Will was admitted to probate and letters testamentary were issued to the First National City Bank of Alliance, Ohio, now known as Bank One of Alliance.

5. During the administration of the estate of John Marcu, one John Dalalau filed a complaint in the Probate Court of Stark County, being case number 49, whereby he sought specific performance of a contract to make a will and to declare and impress a trust in his favor on the assets of the decedent's estate. The complaint named as defendants the Executor, these plaintiffs and other residuary legatees under the will.

6. The First National City Bank of Alliance, now known as Bank One of Alliance, as Executor of the Estate of John Marcu, deceased, filed, sua sponte, an Answer to the complaint of John Dalalau (hereafter "Dalalau") in its fiduciary

capacity and on behalf of the plaintiffs and the other legatees under the will of said decedent.

7. The trial of the complaint of John Dalalau was held on November 17, 1982 in the Probate Court[1] without the appearance or presence of the plaintiffs or their duly authorized representative to defend in the case.

8. Thereafter, on January 7, 1983, the Probate Court entered a judgment in favor of John Dalalau on his complaint, and thereby extinguished the plaintiffs' rights as legatees and devisees under the Will of John Marcu, deceased.

9. The plaintiffs never received any notice of the date of the trial aforesaid, either from the Probate Court or the Executor of the estate or from the attorney for John Dalalau. The plaintiffs did not have any knowledge that a trial would be held on the subject complaint on November 17, 1982.

10. The Bank-Executor was notified of the trial date of the Dalalau action, but it did not appear at the trial and did not take any measures to protect and preserve the rights of the plaintiffs in connection with the aforesaid trial. Moreover, the Bank-Executor failed and/or refused to notify the plaintiffs of the outcome of the trial and to advise them of the court's decision.

11. The plaintiffs, as foreign nationals and residents, were unknowledgeable about the laws and judicial process in the United States, uninformed as to the laws and rules that governed the lawsuit against them in the Probate Court, and untutored as to their rights as legatees and devisees.

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[1] The presiding judge is deceased.

12. Because of the aforementioned conduct of the Bank-Executor, the plaintiffs, on December 27, 1984, filed a damage action against the said fiduciary in this Court entitled *Maria Peste, et al., v. The First National City Bank of Alliance, Ohio,* case number C-84-3963-A. On October 22, 1985, this Court granted summary judgment in favor of the Bank-Executor on the ground that the misconduct of the Bank-Executor was not the proximate cause of plaintiffs' loss of inheritance, but that their loss was due instead to the judgment of the Probate Court on the Dalalau complaint which nullified their rights as legatees under the Will of John Marcu.

13. Plaintiffs appealed the adverse decision of this Court in favor of the Bank-Executor to the United States Court of Appeals for the Sixth Circuit, case number 85-3979. The Sixth Circuit affirmed the judgment of this Court, and, on December 3, 1986, it denied the plaintiffs' petition for a rehearing, en banc.

14. Before filing the suit against the Bank-Executor in this Court, the plaintiffs moved the Probate Court to vacate the judgment against them in the Dalalau action, but to no avail.

15. As a result of the failure and/or refusal of the Probate Court to notify the plaintiffs of the date of the trial of the subject action, and of the court's action in holding and conducting the trial in the knowledge that the plaintiffs had not been notified of the trial date, and without their presence or appearance in court, the plaintiffs were denied and deprived of the right to appear and to defend in the subject action against them and to protect and preserve their rights as legatees and devisees. As a direct consequence, the plaintiffs were deprived of their rightful inheritance from the estate of John Marcu.

16. In failing and refusing to protect and to preserve the rights of the plaintiffs as shown hereinabove, the Probate Court deprived them of a valuable property right in the inheritance without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

WHEREFORE, Plaintiffs pray:

1. That the judgment of January 7, 1983, which was rendered by the Probate Court on the complaint of John Dalalau, be declared to be in violation of the Constitution of the United States insofar as that judgment authorized the deprivation of the plaintiffs' inheritance without due process of law.

2. That the Court issue a mandatory injunction directing the Honorable R. R. Denny Clunk, defendant, to annul and to vacate the judgment entered on January 7, 1983 in the estate of John Marcu, deceased, being case number 49, docket 431 in the records of the Probate Court of Stark County, Ohio.

3. That the court direct the Honorable R. R. Denny Clunk to execute such documents or orders as may be necessary or appropriate to invalidate the aforesaid judgment.

4. That the complaint with jury demand heretofore filed in this court against The First National City Bank of Alliance, Ohio, now known as Bank One of Alliance, Ohio, being case number C 84-3963A, be reinstated upon the docket of this court and that an order issue directing said action to proceed on the basis of said complaint as though the case had been filed anew, preserving unto the defendant therein all of its due process rights relative thereto and connected therewith.

5. For such other and further relief as to this court shall seem just and proper.

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